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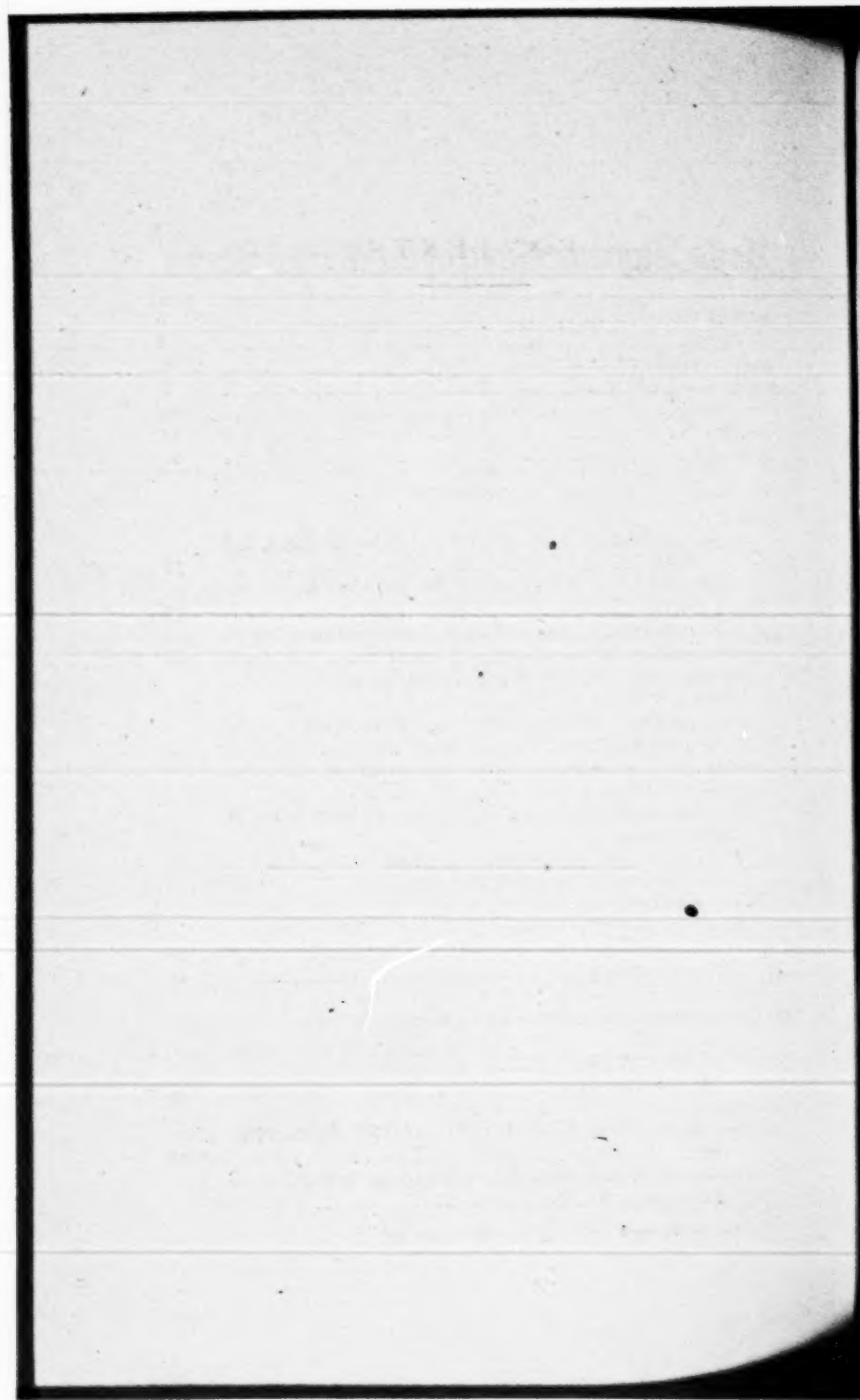
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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 524

NORRIS & HIRSHBERG, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

OPINIONS BELOW

No opinions accompanied the orders of the United States Court of Appeals for the District of Columbia dated November 19, 1947 (R. 198)¹ and January 5, 1948 (R. 199). A prior opinion in the same action dated February 17, 1947 (R. 146), as amended June 5, 1947 (R. 153), is reported at 163 F. 2d 689.² The opinions and

¹ Unless otherwise indicated references herein are to the pages of the printed record.

² Only the amended opinion is reported.

orders of the Securities and Exchange Commission dated January 22, 1946 (R. 44), April 17, 1946 (R. 111), and March 11, 1947 (R. 163), are contained in Securities Exchange Act Release Nos. 3776, 3810, and 3926 but have not as yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)), to review orders of the United States Court of Appeals for the District of Columbia dated November 19, 1947 (R. 198), and January 5, 1948 (R. 199).

QUESTION PRESENTED

Was it error for the court below to require a petitioner seeking review of an order of the Securities and Exchange Commission to brief his case on the merits without directing interrogation as to the manner in which the members of the Commission utilized the record in arriving at their decision where, after two years of preliminary controversy and rulings concerning a proper certification, there remains no dispute that the certified transcript of the record properly reflects the evidence that was offered and received in the administrative proceedings?

STATUTE INVOLVED

Section 25 of the Securities Exchange Act of 1934, 48 Stat. 901 (15 U. S. C. 78y) provides:

SEC. 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

STATEMENT

Petitioner is a broker and dealer in securities registered as such pursuant to the Securities Exchange Act of 1934 (15 U. S. C. 78). In opinions and orders dated January 22, 1946, and April 17, 1946, the Commission revoked petitioner's license pursuant to Section 15 (b) of the Securities Ex-

change Act, after finding that petitioner had willfully violated the anti-fraud provisions of that Act and of the Securities Act of 1933 (15 U. S. C. 77), by abusing its fiduciary relationship to its customers and by fraudulent and manipulative market practices, and that it was in the public interest to revoke. The Commission granted administrative stays of its order pending consideration of a petition for rehearing, and, after denial of rehearing in the order of April 17, 1946, pending the filing of a petition for review (R. 111-113).

On April 29, 1946, petitioner filed a petition for review in the court below (R. 153). The Commission stipulated to a stay of the revocation order pending review, and the court on May 2, 1946, directed such a stay. The stay has continued in effect to the present time and petitioner has continued in business as a broker and dealer.

On June 8, 1946, a transcript of record was filed on behalf of the Commission (R. 154). The form of certification was one which the Commission had theretofore used without challenge, executed by the chief of its Docket Section, who is the official custodian of its records (R. 206-7, 170-1).

Without first giving the Commission an opportunity to correct the transcript, petitioner on June 28, 1946, applied to the court below for a common law writ of certiorari directed to the Commission, citing as deficiencies in the certified

transcript that: (1) the copies of the stenographer's transcript did not reflect corrections accepted by the parties prior to the Commission's decision; (2) the index to the transcript as filed misdescribed certain of petitioner's exhibits which had been submitted and received in evidence, as received "for identification only"; (3) that extraneous material purporting to be summaries and explanations of certain Commission exhibits, which extraneous material was never offered or admitted in evidence, was included in the exhibits as if part thereof; (4) that the Commission had failed to file as part of the record a summary or digest of the testimony, which petitioner stated its attorney had been permitted to see but not examine, and which as a matter of "common knowledge" the Commission was alleged to have prepared for its use in the decision of cases, which summary petitioner "believes" inaccurate. Arguing from these objections that the Commission's decision was not based upon a proper consideration of the record, petitioner sought to have the Commission interrogated as to its use of the record. (R. 128-134.)

On July 17th, 1946, the Commission answered urging that corrections theretofore submitted to the Clerk³ and now tendered to the Court fully

³ The Commission tendered a corrected index and a corrected stenographer's transcript as soon as these matters were called to its attention (R. 140-145). A rule of the court below permits parties to stipulate to a corrected transcript

met petitioner's complaint with respect to the index and with respect to the variations in the stenographer's minutes;⁴ that it was apparent from the face of the record that the so-called extraneous material had not been deemed evidence by the Commission; that, at least on the basis of the corrections tendered by the Commission there was no record support for petitioner's surmise that the Commission had been misled as to what constituted evidence in the case; and that it was improper to direct an inquisition as to the existence or content of any summary of evidence which might have been prepared as part of the Commission's decisional process.⁵ (R. 135-139.)

(Rule 38 (e)), but the clerk of the court below refused to accept the corrected documents on the ground that litigation with respect to them was pending.

⁴ Petitioner had not pointed out specifically wherein the carbon copy of the stenographer's minutes filed in the court differed from the ribbon copy which had been retained by the Commission. Pursuant to stipulation between petitioner and counsel who conducted the administrative hearing for the Commission, corrections had been agreed to, and initialed upon both ribbon and carbon copies. A page-by-page check made in response to petitioner's objections revealed variations on only three pages and these of a trivial character (R. 136-137).

⁵ After having, on August 8, 1946, obtained a seven-week extension of time to reply to the Commission's answer, petitioner sought to be relieved of briefing the case on the merits until after disposition of the issues he had thus raised. The court below never ruled directly on this request but its subsequent action returning the record to the Commission and compelling the Commission to recertify had the effect under its rules of giving the petitioner until 40 days after the Commission's final certification to submit its brief. Petitioner's motions are part of the unprinted record.

Petitioner's reply was filed on September 6, 1946, oral argument was heard on October 25, 1946, and the court below rendered an opinion on February 17, 1947 (R. 146-152). That opinion, ignoring corrections theretofore tendered by the Commission, criticized what had been originally filed because that transcript contained as Commission exhibits documents not received in evidence, and because of the mislabeling in the index. The court stated it was unable to say whether the index was prepared only for the court or for the Commission itself (R. 149). It was concluded that certification by the official custodian of the Commission's records could not satisfy the statutory requirement that "the Commission shall certify," and that the certification was likewise deficient for certifying the transcript as the record "of the proceeding * * * in which the orders complained of * * * were entered," rather than, as the statute prescribes, a "transcript of the record upon which the order complained of was entered." * (R. 150-151.) The court ruled, however, that it would be "neither necessary nor proper" to include in the transcript any summary of evidence which the Opinion Writing Office of the Commission may have sub-

* This objection, while not raised by the petition for a common law writ of certiorari, had at least in part been raised in subsequent argument by petitioner. (See Petitioner's Memorandum in Support of Petition for Certiorari, in the unprinted record.)

mitted to the Commissioners in the course of decision. Petitioner sought a rehearing as to this ruling of the court below. (R. 175.)

On March 11, 1947, and without waiting for the disposition of this petition for rehearing, the Commission tendered a new certification (R. 161-162) executed "By the Commission" through its Secretary and in the statutory language (R. 161-162). This certification incorporated documents already on file with the court below specifying the corrections theretofore tendered in lieu of a portion of the original certification and certifying that the disputed index was not part of the record upon which the order complained of was entered, and that the explanatory material attached to certain Commission exhibits "were not offered or received in evidence and were ruled by the Commission not to be evidence in the case" (R. 162). Attached to this certification was an opinion of the same date describing in more detail the record status of the material which had troubled the court below and the relevant administrative practice in connection with certification, including reasons for preserving and certifying, as a record of what had in fact transpired, the material which the Commission had ruled not to be evidence (R. 163-174).

On June 5, 1947, the court below denied rehearing but amended, as of its original date, the opinion of February 17, 1947 (R. 153-60). Without dis-

cussing the Commission's opinion of March 11, 1947, or directly ruling upon the transcript therewith tendered, it directed its clerk to remove the record from the files of the court below and return it physically to the Commission. The amended opinion ruled for the first time that the original certification was objectionable as including surplusage⁷ and ordered "that the Commission must file a transcript containing, in addition to the pleadings, all the material received in evidence, and nothing else." (R. 160.) The Commission sought reconsideration of the court's order insofar as it required physical removal from the court's files of material theretofore filed, urging that this material might be needed for subsequent consideration by the court below in connection with review on the merits or consideration by this court in the event that either party would desire to file a petition for certiorari.⁸ (R. 175-185.) This re-

⁷ The Commission had relied both in arguments of its counsel, and in its March 11, 1947, opinion upon the fact that statements identical to those criticized as improperly attached to the exhibits in question were elsewhere properly in both the administrative record, and the court record, to show the contentions which the Trading and Exchange Division of the Commission had served upon petitioners and the examiner (R. 255).

⁸ The Commission also made an attempt to meet the court's views as to convenience by referring specifically to portions of the transcript theretofore certified as the transcript of record upon which the order complained of was entered.

quest was refused on July 16, 1947, and the record was returned.* (R. 193.)

On July 21, 1947, petitioner moved the Commission to vacate its findings and opinion and order, and to hear oral argument upon the issues resulting from the remand¹ (Petitioner's Motion for Judgment or Other Appropriate Relief, p. 5, Unprinted Record). The Commission denied this motion on September 23, 1947. On the same date it recertified the transcript to the Court of Appeals in the form now challenged by the petition for certiorari. (R. 194-197.) Petitioner again objected, claiming that the record was still deficient in its failure to contain the alleged summary of the record; and the certification was again attacked on the ground that the certification did not indicate how the various items objected to in the record as originally certified were treated by the Commission in its decisional process (R. 147). Petitioner asked that a master be appointed, interrogatories framed and issued, or detailed statements certified by the Commission pursuant to court order. All these requests were denied in the order of the court below entered November 19, 1947, one of the orders to which this petition for writ of certiorari is addressed. (R. 198.)

* The Commission has preserved the material which the court returned and thus has been in a position to certify in connection with the stipulation filed in this Court such portions of the material as the parties have desired to present to this Court in connection with the petition for a writ of certiorari.

Petitioner then moved for a rehearing, for findings of fact and conclusions of law to be entered by the court below, for recall of the record sent back to the Commission so that it might be lodged in this Court for purposes of review, and for the further suspension of proceedings on the merits (R. 198-199). On January 5, 1948, the court below denied all the requests, and petitioner was ordered to file its brief on the merits by January 12, 1948, unless, in the meantime, a petition for writ of certiorari was addressed to this Court (R. 199-200). This is the second order sought to be reviewed in this Court.

This petition for a writ of certiorari having been filed on January 12, 1948, the petitioner continues to enjoy not only a stay of the administrative order but a stay of any obligation to prosecute his petition to review by filing a brief on the merits.

ARGUMENT

1. The petition for a writ of certiorari raises only the question whether the court below erred in directing petitioner to prosecute its case on the merits after two years of interlocutory rulings as to a proper certification of the administrative transcript. Whatever may have been the justification, or lack of justification, for petitioner's exceptions to the earlier certifications filed by the Commission, it is not disputed that the present certified transcript fully reflects the evidence offered and received in the administrative proceed-

ing. That transcript is certified "By the Commission" and in the exact language of the statute. That the certification by the Commission is attested by its Seal and the signature of its Secretary rather than by signatures of the individual Commissioners merely conforms to the method by which all other Commission action is evidenced, both in the cases of the Securities and Exchange Commission and other administrative commissions. If the petitioner contends that a reviewing court lacks jurisdiction to proceed with a petition for review on the merits until it is satisfied, on the basis of a time-consuming inquiry into the intellectual processes of the individual deciding Commissioners, that they have made conscientious use of the record, then, while the issue is of course an important one, petitioner's contentions are clearly unwarranted. Such an inquisition has repeatedly and uniformly been denied.¹⁰

Petitioner does not squarely challenge these holdings, but has attempted to distinguish this case by pointing to alleged "deficiencies and in-

¹⁰ *United States v. Morgan*, 313 U. S. 409; *Southern Garment Mfrs. Ass'n v. Fleming*, 122 F. 2d 622 (App. D. C., 1941); *Bethlehem Steel Co. v. N. L. R. B.*, 120 F. 2d 641 (App. D. C., 1941); *N. L. R. B. v. Lane Cotton Mills Co.*, 108 F. 2d 568 (C. C. A. 5, 1940); *N. L. R. B. v. Botany Worsted Mills, Inc.*, 106 F. 2d 263 (C. C. A. 3, 1939); *Inland Steel Co. v. N. L. R. B.*, 105 F. 2d 246 (C. C. A. 7, 1939); *Cupples Co. Mfrs. v. N. L. R. B.* 103 F. 2d 953 (C. C. A. 8, 1939); *N. L. R. B. v. Biles Coleman Lumber Co.*, 98 F. 2d 16 (C. C. A. 9, 1938). Cf. *National Labor Relations Board v. Cherry Cotton Mills*, 98 F. 2d 444 (C. C. A. 5, 1938).

adequacies" in the record, which it argues warrant further inquiry into the Commission's use of the record in this case. If there were substance to this contention, it is not, we submit, a matter warranting review by this Court in advance of review on the merits. In any event petitioner's arguments rest upon nothing more substantial than its own highly suspicious surmise.

2. The Commission has clearly ruled not to be evidence the argumentative explanations which were attached to certain exhibits by the Trading and Exchange Division of the Commission after their introduction in evidence and before the case was submitted to the trial examiner. This ruling at the oral argument¹¹ was reiterated in the certification submitted after the court below had questioned the status of this material (R. 162). Petitioner has never contended that the material was not properly in the administrative record as argumentative material, since identical statements were contained in the proposed findings which the staff of the Trading and Exchange Division served on petitioner's counsel (R. 255). The objection was merely that, by physically attaching duplicates of this argumentative material to the exhibits which it summarized and explained, there

¹¹ At the argument the presiding Commissioner first ruled that "they will be removed" and then after further colloquy that "they will go in their proper place as part of the argument rather than as part of the record" (R. 259).

was given "the appearance that they form part of the exhibits actually in evidence" (R. 259).

In allowing the material to remain in its files together with the Commission's ruling, the Commission has merely followed a common practice whereby the granting of a motion to strike, at least in the case of material which is not scandalous, does not result in the stricken material being physically removed from a record. Accordingly, we believe that the material was properly included in the original certification which placed before the court below a record of precisely what happened in the course of the administrative hearing. However, the action of the court below, taken in connection with petitioner's objections, has resulted in the material being physically excluded from the record of the court below.¹²

Had the court below required petitioner to brief its case on the merits and deferred until con-

¹² In its final certification dated September 23, 1947, which the court below accepted, the Commission excluded this material under protest but stated that it was prepared to recertify this material if needed as a result of further proceedings in the court below or in this Court (R. 194-7). Pursuant to stipulation so much of this material as the parties have desired to use in connection with the present petition for a writ of certiorari has been certified by the Commission and attached to the stipulation filed in this Court (R. 201-206). The present petition for a writ of certiorari does not challenge the court's exclusion of this material and return of the same to the Commission by its order dated July 16, 1947. The time to review this interlocutory ruling has long since expired.

sideration on the merits; this and other objections of petitioner, we believe, the triviality of petitioner's objection would have been the more apparent, inasmuch as petitioner never related to any significant issue on the merits his objections to the attaching of the explanatory material to the exhibits. Indeed petitioner never indicated to the Commission wherein the explanatory material was inaccurate in its purported summary and explanation of the exhibits in question.¹³

3. The objection based upon the original, and now withdrawn, index is even more captious. The original index showed on its face that it had been prepared after the decision under review since it included as part of its indexed items the opinions and orders of the Commission. Moreover, the supposition on the basis of the index that the Commission treated exhibits received in evidence as merely received for identification was refuted by the fact that the Commission quoted from and expressly relied upon part of this material in its opinion (R. 83). In any event the physical body of the record leaves no doubt that this material was—as petitioner rightly contends—part of the evidence (R. 127-8).

The Commission's opinion of March 11, 1947, describes its administrative practice in connection with the preservation and certification of records,

¹³ The petition for a common law writ of certiorari urges without specification of detail that the summaries are inaccurate (R. 131).

explains that in accordance with that practice the official custodian of its files had prepared the index as a routine clerical matter, for the convenience of the reviewing court and the parties to the review proceeding, and had done so after the petition for review had been filed (R. 163-174). There was thus no basis for the supposition that the error in the index may have misled the Commission in deciding the case. Here again we believe that by persuading the court below to entertain his procedural objections in advance of review of the case on the merits, the petitioner succeeded in creating a wholly false impression as to the significance of a clerical error occurring after the petition to review was filed. The consequence has been to delay progress with the merits of the case. In any event the various corrected indices tendered in the court below and the final certification accepted by the court below removed the incorrect index from the case.

4. Further justification for inquiry into the Commission's use of the record is sought by petitioner in the announced policy of the Commission to utilize staff assistance in the discharge of its statutory responsibilities.¹⁴ Petitioner has alleged

¹⁴ The Commission has made no mystery of its procedure for utilizing its Opinion Writing Office to aid it in the discharge of its statutory duties. Normally, this office prepares an unbiased digest of the evidence for the use of the Commis-

that the staff of the Opinion Writing Office prepared, in this case, a summary of the record for the use of the Commissioners in the course of their deliberations.

The Commission has neither affirmed nor denied the existence of such a summary and of course has not denied the charges based upon petitioner's surmise that the Commission used a misleading summary. The Commission has maintained that the internal memoranda utilized by it in the course of decision are not open to inquiry by petitioner any more than are the deliberations at the Commissioners' conferences. As this Court has held, such an inquiry may not be conducted, for it renders a statute which is designed as a proceeding to review an order a vehicle for general exploration by one arm of the government into the internal affairs of another in complete disregard of the "appropriate independence" of the administrative agencies and courts and the "integrity of the administrative process." *United States v. Morgan*, 313 U. S. 409. Petitioner has not referred us to any ground for distinguishing the holding in the *Morgan* case. Instead, it characterizes the summary as "prejudicial" although it is admitted that

sioners. More detailed facts concerning this procedure were published, pursuant to the requirements of Section 3 (a) of the Administrative Procedure Act, in the Federal Register of September 11, 1946, 17 C. F. R. 177A-718.

counsel for petitioner have never examined it (R. 132).¹⁵

5. Petitioner's third argument appears to be that in the light of what had theretofore transpired in the case the Commission was precluded from certifying as a Commission in the language of the statute that the documents are those "upon which the order of the Commission complained of was entered." In that connection petitioner adverts (Pet. br. n. 5, p. 14) to changes in the personnel of the Commission,¹⁶ and to the statement by the Commission to the court below, that the earlier certification then tendered "can purport to be no more than an assurance of the Commissioners now certifying that they conscientiously regard" the accompanying documents as "a transcript of the record upon which the order

¹⁵ A statement by the trial examiner is quoted to indicate the "misleading nature of the summary" (Petitioner's brief, p. 13). This quotation itself is wholly misleading, for, as is apparent, the examiner was there commenting upon requests for findings offered to him by the Trading and Exchange Division. These requests were served on the petitioner in normal course and can have no connection with the alleged summary of the record prepared by the Opinion Writing Office. Section 5 (c) of the Administrative Procedure Act (5 U. S. C. 1004 (c)) requires that these divisions have separate and distinct functions and may not collaborate. The Commission adheres strictly to this requirement. See 17 C. F. R. 177A-718.

¹⁶ Actually only one of the Commissioners who participated in the order under review was in office on September 23, 1947, which is the date of execution of the certification presently under attack.

complained of was entered." (R. 190.) This is characterized as an "evasion" and it is not clear that any certification by present Commissioners could satisfy petitioner.

We believe that the properly authenticated orders of the Commission which petitioners seek to set aside themselves constitute an affirmation by the Commissioners then in office that they conscientiously discharged their decisional process. Upon remand of the case by the order of the court below dated July 16, 1947, successor Commissioners were afforded an opportunity to reopen the case, or to recertify the record in the light of the court's action. When the Commissioners then in office did recertify a record in the language of the statute, we believe it clear on basis of the authorities already cited (note 10, p. 13, *supra*) that there was no basis for further inquiry as to the decisional process. Indeed the changes in membership which have occurred only emphasize the inappropriateness of the inquiry which petitioner seeks.

CONCLUSION

It is now almost two years since the petitioner has filed its petition for review in the court below. This petition for certiorari is the latest of petitioner's numerous applications and motions, none of which in our opinion involved any issue going to the substance of the case and which have

thus far prevented the case from being heard on the merits in the Court of Appeals. The contentions raised by the petition for certiorari are specious—and would not present any issues warranting further review by this Court even if they were not. The petition for certiorari should be denied.

Respectfully submitted.

✓ PHILIP B. PERLMAN,
Solicitor General.

✓ ROGER S. FOSTER,
Solicitor,
Securities and Exchange Commission.

MARCH, 1948.